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No. 90-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

MARY ALICE KNIGHT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. Respondents characterize this case as one in which the Third Circuit's holding corrected "procedural and evidentiary errors." Opp. 5. The Third Circuit did indeed reverse based on its interpretation of "evidentiary" standards—Rules 403, 702 and 703 of the Federal Rules of Evidence—and its interpretation of a "procedural" rule—Rule 56 of the Federal Rules of Civil Procedure. Those "procedural" and "evidentiary" issues are immensely important. They apply across the board to litigation in the federal courts involving experts. At the same time that other Circuits are applying these federal Rules to prevent cases based on unsupported expert opinions from reaching juries, the Third Circuit has invented a series of procedural obstacles that the Rules do not call for and that other courts of appeals do not apply, and in addition has told its district judges that they should not reject expert opinions at the summary judgment stage except "rarely." A. 72a. Here it held that the District Court erred in rejecting opinions the District Court examined

and found were unsupported and unreliable. Indeed, the Third Circuit itself just six weeks ago cited its holding in this case extensively as authority for what it described as "the Third Circuit's 'broad' and 'liberal' standards of admitting expert testimony." *Hines* v. *Consolidated Rail Corp.*, 826 F.2d 262 (3d Cir. 1991); see also Pet. Cert. 10 n.10.

This is not, as the Brief in Opposition would portray it, some routine case in which a district court was reversed because it committed some commonplace error of ordinary procedure. See Opp. 5-6, 8. The District Court here followed all the ordinary pretrial procedures of the Federal Rules as applied in other Circuits, on whose decisions it relied. See A. 98a-99a, 105a-110a. It rejected causation opinions of experts who, when asked to support their conclusions, it found "ha[ve] no intelligible response," A. 124a, and whose opinions the District Court concluded were "not sufficiently scientifically reliable." A. 123a. It unambiguously excluded them under Rules 403 and 703, and in some instances Rule 702 also. A. 110a. Reversing, the Third Circuit as part of its holding announced extraordinary procedures it will require under the Federal Rules of Evidence—requirements that those Rules nowhere mention and that no other Circuit applies.

For example, the Third Circuit announced that from now on Rule 403 requires a district judge to compile "a virtual surrogate for a trial record," A. 72a, before excluding an expert opinion. It held that 2,400 pages of deposition testimony here were not sufficient. A. 71a. It criticized the District Court's 47-page opinion, even though Rule 56 does not require district judges to write opinions or make findings on summary judgment at all, and even though the District Court discussed each expert's opinion and plainly explained its ruling, *e.g.*, A. 110a, 123a-124a.[1] Moreover, elsewhere the Court of Ap-

[1] For example, the District Court explained that even if Dr. Nicholson's "meta-analysis" opinion that PCBs could cause diseases

peals acknowledged that the District Court indeed had supported exclusion with findings, but the Third Circuit declined to accept them; for example: "We dismiss out of hand the district court's finding . . . that 'Dr. Nicholson's testimony would confuse the jury . . . .'" A. 65a n.35. In another procedural innovation, the Third Circuit held that an *in limine* evidentiary hearing should have been held, A. 61a-62a, even though neither set of Federal Rules imposes such a requirement on trial judges, even though there was a full record of testimony—and even though here the plaintiffs themselves had emphatically opposed such a hearing.[2]

2. Respondents' lengthy account of old discovery disputes, Opp. 2-5, has nothing to do with the issues decided by the Court of Appeals and raised in the petition. The District Court's rejection of these experts' opinions rested

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not claimed by these plaintiffs could be otherwise admissible, "it would be difficult to understand how it was relevant." A. 119a. Yet the Court of Appeals said that "[w]hether the court intended a Rule 402 relevancy exclusion is unclear." A. 47a n.17. The District Court held that "Even if I found that plaintiffs' experts' testimony reached the level of being probative, I would rule to exclude it on the basis of Rule 703 and 403 as 'unhelpful' and more prejudicial than probative." A. 110a. Yet the Court of Appeals said that "it is not clear that the court actually excluded any opinions under Rule 403." A. 71a.

[2] Respondents are not faithful to the record when they assert that "Petitioners inaccurately state that plaintiffs opposed an *in limine* hearing." Opp. 5 n.4. In fact, elsewhere they acknowledge they opposed it. Opp. 11 n.7. What they said to the District Court was: "Finally, defendants now ask this Court for hearings *in limine*. This application has no place whatsoever in a motion for summary judgment." R. 10023. The Third Circuit finally amended its original opinion to acknowledge their opposition. See A. 23a, 61a, 86a-87a, 89a.

The Brief in Opposition also misstates the record in asserting, without citation, that "plaintiffs' experts pointed to epidemiological studies supporting their opinions." Opp. 19. That is not correct. None of the epidemiological studies in the record showed any correlation between PCB exposure and any of the multiple ailments claimed.

on *their own admissions*, extracted from them in depositions, as to the lack of scientific basis for their opinions. No record could be plainer. No discovery could alter the record of what they themselves said. Indeed, no additional discovery was sought by respondents prior to the District Court's ruling.[3]

3. Respondents do not attempt to dispute:

—That unless the Bendectin decisions rejecting unsupported expert opinions apply only to Bendectin, there is a clear conflict in the Circuits.

—That unless the decisions rejecting unsupported expert opinions of economists apply only to economists, there is a clear conflict in the Circuits.

—That a "significant body of judicial and academic comment" [4] has recognized the need for an authoritative decision on how unsupported expert opinions are to be treated, procedurally and substantively, in the federal courts.

—That while the Seventh Circuit holds that "Judges should not be buffaloed by unreasoned expert opinions," *Mid-State Fertilizer Co.* v. *Exchange Nat'l Bank*, 877 F.2d 1333, 1340 (7th Cir. 1989), the Third Circuit by contrast here has warned its district judges against the pre-trial exclusion of expert testimony, and has created procedural obstacles to exclusion that are not followed in other Circuits.

—That the Third Circuit here departed from the standard of appellate review set by this Court in

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[3] Respondents inaccurately state that one basis they cited for opposing summary judgment was that they "had been denied the opportunity to complete discovery. *See* Fed. R. Civ. P. 56(f)." Opp. 5. The record is clear that they did not oppose summary judgment on that basis, and never invoked Rule 56(f). *Cf. Celotex Corp.* v. *Catrett*, 477 U.S. 317, 326 (1986); Pet. Cert. 25. Nor would it have mattered; summary judgment rested on the most reliable record conceivable: the experts' own admissions as to the lack of support for their own opinions.

[4] *Brock* v. *Merrell Dow Pharmaceuticals, Inc.*, 884 F.2d 167, 169 (5th Cir. 1989) (Higginbotham, J., dissenting), *cert. denied*, 110 S. Ct. 1511 (1990).

Salem v. *United States Lines Co.*, 370 U.S. 31 (1962), and followed in other Circuits.

—That the Third Circuit also rejected the traditional standard for admissibility of expert testimony enunciated in *Frye* v. *United States*, 293 Fed. 1013 (D.C. Cir. 1923), and followed in at least six Circuits.

4. Unable to deny that several Circuits now insist that their district courts screen out unreliable expert testimony, respondents first argue that "toxic tort" cases are a realm unto themselves, so that recent strong holdings affirming exclusions of unsupported opinions by, for example, economic experts,[5] create no conflict. Opp. 14 n.9.

But then, faced with "toxic tort" decisions from at least five Circuits that also exclude unsupported expert opinions or hold them insufficient to create a genuine issue of material fact, respondents decide that even "toxic torts" is too broad a category. They conclude that if one looks at each appellate decision as "a different factual setting," then "[a]ll of the cases cited by Petitioners can be harmonized with the Third Circuit's decision." Opp. 13. They assert that "the different outcomes can be explained by the different scientific knowledge or chemical compounds involved." Opp. 12. What they appear to be suggesting is that the federal law of evidence and summary judgment should be different for each chemical. Thus the Bendectin decisions that reject unsupported expert testimony,[6] respondents argue, apply only to Ben-

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[5] *E.g.*, *Coal Resources, Inc.* v. *Gulf & Western Industries, Inc.*, 865 F.2d 761, 772 n.4 (6th Cir. 1989); *McGlinchy* v. *Shell Chem. Co.*, 845 F.2d 802, 807 (9th Cir. 1988); see also, *e.g.*, *Mid-State Fertilizer Co.* v. *Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989).

[6] *E.g.*, *Brock* v. *Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, *modified*, 884 F.2d 166 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1511 (1990); *Richardson* v. *Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 218 (1989); *Lynch* v. *Merrell-National Labs.*, 830 F.2d 1190 (1st Cir. 1987).

dectin. Opp. 13, 18.[7] But the courts of appeals in the Bendectin cases, exactly like the District Court here, rejected opinions that ignored decades of uniformly negative studies and rested only on the individual experts' eccentric and unsupported views. The Federal Rules of Evidence and the Federal Rules of Civil Procedure as to summary judgment set standards for expert testimony of all kinds, and their application should be uniform throughout the Circuits.

5. Nowhere does the Brief in Opposition respond at all to point (b) of the first question presented—that the Third Circuit here failed to review the exclusion of experts under the "manifestly erroneous" standard of review set by this Court in *Salem* v. *United States Lines Co.*, 370 U.S. 31 (1962), and followed in other Circuits.

6. The attempt to reconcile the Third Circuit's opinion with the leading Fifth Circuit decision in *Viterbo* v. *Dow*

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[7] Respondents also argue, Opp. 19, that Bendectin is different because it has been widely studied without any finding of teratogenicity (except by the excluded experts). But the record establishes that PCBs also have been one of the most widely studied chemicals over the past two decades, and that there never has been a finding that they are capable of causing any of the health effects alleged here. The statement at Opp. 3 n.2 that PCBs are "toxic" is at best misleading. PCBs if eaten have an acute toxicity of about 2 on a scale of 1 to 6, approximately the same as ethyl alcohol or table salt. CASARETT AND DOULL'S TOXICOLOGY 12 (2d ed. 1975). One of respondents' experts confirmed that "PCBs have very low potential for producing acute toxic effects." R. 7301. The record further reflects no study finding that PCBs at such levels could produce any health effect in human beings other than chloracne, a temporary skin irritation of which no respondent complained. R. 7774-75. The U. S. Public Health Service in a comprehensive 1987 study of PCBs concluded that "Adverse health effects [from PCBs] have not been observed in people in the United States with nonoccupational exposure," that even at high doses "[o]ccasional skin irritations, usually acnelike lesions and rashes, and liver effects are the only significant adverse health effects that have been observed in PCB-exposed workers," R. 4392, and that "[t]hese and other data provide inadequate evidence of carcinogenicity in humans." R. 4406.

Chem. Co., 862 F.2d 420 (5th Cir. 1987), simply underscores the conflict. Respondents point out that in *Viterbo* "the doctor relied only upon an incomplete oral history from the plaintiff and one study linking the substance in question to cancer in rats. The plaintiff did not have cancer." Opp. 13. Yet in the present case, respondents' principal expert on causation, Dr. Barsotti, admitted to never having met any of the plaintiffs at all, R. 4919, and to having talked with only one of them by telephone. R. 5814. And the only expert who claimed to infer from existing studies any correlation of PCBs with any kind of cancer in laboratory animals, Dr. Nicholson, restricted his opinion to liver, gall bladder and biliary tract cancers in animals, R. 9377—illnesses which, as in *Viterbo*, no plaintiff here alleged.

Respondents attempt to distinguish *Hull* v. *Merck & Co.*, 758 F.2d 1474 (11th Cir. 1985), because, they say, the expert there "'assumed' significant exposure to a chemical and 'assumed' it had caused the illness." Opp. 14. But that is exactly what, as the District Court pointed out, A. 124a, the "experts" did here. Dr. Zahalsky acknowledged that he assumed, without any data, that respondents had high levels of PCBs, R. 6022, 6054-55, 6057-58, and from that he further assumed, without more, that PCBs had damaged their immune systems. R. 6275, 6297; see Pet. Cert. 4-5 & n.6. Dr. Shubin testified that his scientific method was to assume PCBs caused every illness complained of "until I would be shown that I was wrong." R. 6394.[8] Dr. DiGregorio testified that he had performed no physical examinations and "never reviewed any medical records of anyone,"

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[8] For example, Dr. Shubin swore that PCBs had caused a woman to suffer four spontaneous abortions, although he did not know when in the past forty years they had occurred, and knew nothing about their circumstances except that she said she had had them. R. 6757-63, 6474-75. He opined that PCBs had caused the death of a two-month-old child, although he acknowledged that he had no information whatsoever as to the medical history or death of the child, or even the year of its death. R. 6751-54.

R. 7216, but nevertheless attributed their ailments to PCBs "until proven otherwise." R. 7169.[9]

7. Respondents observe that "The Third Circuit's decision is perfectly consistent with its prior rulings." Opp. 6. It may well be, although it goes further than any so far. For example, the Third Circuit unlike some others for six years now has refused to follow the test of *Frye* v. *United States*, 293 Fed. 1013 (D.C. Cir. 1923),[10] and allows expert testimony based on scientific theories that are not generally accepted. See Pet. Cert. 11-12, 18-19. This is also not the first time that the Third Circuit, as noted above, has failed to apply the standard of appellate review set by *Salem* v. *United States Lines Co., supra.*[11] The Third Circuit also over the years has mandated a unique and expanding set of procedural requirements to impede exclusions of expert testimony; it calls them "the protocols established by the jurisprudence of this court for evidentiary rulings governed by Fed. R. Evid. 702 and 703." A. 21a. To those special Third Circuit procedures, in the present case, the Court of Appeals added its admonition that pretrial exclusion of expert opinions under Rule 403 is an "extreme measure" that should "rarely" be used. A. 72a; see Pet. Cert. 19-20. The Third Circuit's consistency with its own prior rulings (which it cites extensively)—instead of with the decisions of other Circuits (which the District Court relied upon, A. 105a-106a, but which the Court

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[9] Petitioners limited the petition for certiorari to the standards the Court of Appeals set for admissibility of evidence of, and summary judgment on, causation. See Pet. Cert. 3, 6 n.7. Therefore it is inexplicable why the Brief in Opposition discusses experts whose testimony pertained solely to the exposure issues, which are not raised here, see Opp. 14-15 (Dr. Allen), 17 (Dr. Nisbet), and Dr. Calesnick, Opp. 17, who submitted only a one-sentence opinion that medical examinations should be conducted. R. 9108; see A. 124a.

[10] See *United States* v. *Downing*, 753 F.2d 1224, 1237 (3d Cir. 1985) ("we conclude that . . . *Frye* . . . should be rejected").

[11] *E.g., Habecker* v. *Copperloy Corp.*, 893 F.2d 49, 51 (3d Cir. 1990).

of Appeals' opinion never even cites)—underscores that it has embarked in a direction all its own.

8. Respondents also fail to address the conflict between the Third Circuit's "prediction" of future state law, and the rule in other Circuits, which apply state law only as it now exists. Thus the Seventh Circuit's standard is one of "unwillingness to speculate on any trends in state law." *Shaw* v. *Republic Drill Corp.*, 810 F.2d 149, 150 (7th Cir. 1987). Similarly, the Second Circuit has always regarded a federal court's function as "to ascertain what [state] law is, and not to speculate about what it will be." *Hausman* v. *Buckley*, 299 F.2d 696, 704 (2d Cir.), *cert. denied*, 369 U.S. 885 (1962). The Third Circuit nevertheless created a new state "medical monitoring" tort that does not require any proof of physical injury. Even a *state* appellate court recently concluded it judicially inappropriate to create state law the way the Third Circuit did here; it specifically rejected the Third Circuit's opinion, and "decline[d] to create a cause of action for medical monitoring." *Potter* v. *Firestone Tire & Rubber Co.*, 225 Cal. App. 3d 213, 232, 274 Cal. Rptr. 885, 896 (1990).

This Court has never allowed a federal court, as here, to make new state law based on "policy," A. 57a, or guesses about future changes. On the contrary, this Court has held that "the *federal court is not free* to apply a different rule however desirable it may believe it to be, and *even though it may think that the state Supreme Court may establish a different rule in some future litigation.*" *Hicks* v. *Feiock*, 485 U.S. 624, 630 n.3 (1988) (emphasis supplied), quoting *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223, 238 (1940).

9. *FirsTier Mortgage Co.* v. *Investors Mortgage Ins. Co.*, 111 S. Ct. 648 (1991), concerned an order that was *appealable* as soon as entered—not one, as here, that was *non-appealable* when issued and entered. Here it was the later Rule 54(b) judgment that was appealable,

but nine of the respondents never appealed from it. The courts of appeals themselves say they are in conflict. See Pet. Cert. 28-29.

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted.

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